UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BUD'S WOODFIRE OVEN, LLC d/b/a
AVA'S PIZZERIA

and Case 05-CA-194577

RALPH D. GROVES, AN INDIVIDUAL

Oluwatosin Fadarey and Patrick J. Cullen, Esqs.,
for the General Counsel.
Adam E. Konstas and Leslie Robert Stellman, Esqs.,
for the Respondent.

SUPPLEMENTAL DECISION AND ORDER

MICHAEL A. ROSAS, Administrative Law Judge. This is a Supplemental Decision and Order regarding an application for an award of allowable fees and expenses pursuant to the Equal Access to Justice Act, Pub. L 96-481, 94 Stat. 2325 and Sections 102.143–102.55 of the Rules and Regulations (the Rules) of the National Labor Relations Board (the Board) filed by Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria (the Respondent).

STATEMENT OF THE CASE

On May 18, 2018, I issued a Decision and Order in the above-captioned matter.[1] In that decision, I found that the Respondent's mandatory and binding arbitration agreement explicitly interfered with employees' Section 7 rights under the of the National Labor Relations Act (the Act)[2] to file charges and obtain remedies through the Board. Accordingly, I concluded that the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) . However, I dismissed the Section 8(a)(1) allegation that the Charging Party, Ralph Groves (Groves), was unlawfully discharged for exercising his Section 7 rights to engage in protected concerted activity since the preponderance of the evidence failed to establish that Groves' activities were protected and/or concerted. The General Counsel and Respondent each filed exceptions and briefs in support of their respective positions. On August 16, 2019, the Board affirmed my rulings, findings, and conclusions in this case.[3]

[1] *Bud's Woodfire Oven, LLC d/b/a Ava's Pizzeria*, No. 2018 WL2298221 (May 18, 2018).
[2] 29 USC §§ 142–159.
[3] Bud's Woodfire Oven, LLC d/b/a Ava's Pizzeria, 368 NLRB No. 45 (2019).

FINDINGS OF FACT

A. The EAJA Application

On September 10, 2019, the Respondent submitted an Application for Award of Fees and Expenses pursuant to Sections 102.43–102.55 of the Board's Rules ("EAJA application"). By order of the Board issued September 12, 2019, the matter was referred to Chief Administrative Law Judge Robert A. Giannasi for appropriate action.[4] The General Counsel filed her opposition to the Respondent's application on October 15, 2019. The Respondent then filed a motion for leave to amend the EAJA application on October 16, 2019. The General Counsel's reply to the Respondent's motion for leave for the amended EAJA application on October 24, 2019 reiterated her opposition to the application, but did not otherwise oppose the motion for leave to amend the EAJA application. The motion for leave to amend the application is granted.

The EAJA application, as amended, originates from an unfair labor practice charge originally filed by Groves on March 8, 2017. Groves' original charge asserted the Respondent violated Section 8(a)(1) of the Act. The complaint was premised on the allegation that he engaged in protected concerted activity when he complained that general manager Brian Ball "doesn't do shit around here" at a staff meeting. On March 28, 2017, the Regional Director for Region 5 requested that the Respondent provide evidence to refute Groves' allegations.

Region 5 informed the Respondent on August 10, 2017 that it would move forward with Groves' charge. Region 5 examiner Sumintra Aumiller (Aumiller) notified the Respondent that Region 5 found the allegations in the case meritorious. In an e-mail dated August 17, 2017, the Respondent replied to Aumiller that it found issues undermining the merits of the case, and that an administrative law judge would likely dismiss the complaint. (R. Am. Appl. 6.) The General Counsel filed the complaint on August 24, 2017. The Respondent filed its answer on September 5, 2017, and a motion to postpone on October 31, 2017.

The General Counsel filed the first amended complaint on November 3, 2017. The amended complaint added the charge that the Respondent's mandatory arbitration agreement violated Section 8(a)(4) and (1). The General Counsel requested that the Respondent provide more information on the amended charge on November 8, 2017. The Respondent filed a response to the amended complaint on November 15, 2017. The Director of Region 5 notified the parties of the hearing being rescheduled from December 7, 2017 to April 3, 2018, through an order issued on November 28, 2017.

Before the April 3, 2018 hearing, Groves filed a second amended charge against the Respondent. The second amended charge slightly modified the arbitration agreement claim. Region 5 issued a new amended complaint on March 16, 2018, to which the Respondent filed an answer on March 20, 2018.

B. The Decision and Order

I presided over the hearing on April 3, 2018. The witnesses included: Groves; the

[4] The Board should have referred the Respondent's EAJA application to the administrative law judge of the underlying decision. *See* Section 102.148(b) of the Board's Rules and Regulations.

Respondent's employees Jerome Butler and Lynell Harris; the Respondent's bookkeeper and human resources director, Alice Pelanne; the Respondent's general manager, Brian Ball; and Imani Nickens, a paralegal for the State of Maryland's Unemployment Insurance litigation unit. I issued my Decision on May 8, 2018 based on the following conclusions of fact and law:

- The Respondent discharged Groves because he criticized Ball at an October 15, 2016 staff meeting for not doing anything to help out the kitchen staff;

- Groves' statement of "how do you know you don't do shit around here" to Ball during the October 15, 2016 staff meeting did not constitute concerted protected activity under Section 7 of the Act. The statement was a personal gripe, and not about terms and conditions of employment;

- Neither Butler nor Harris corroborated the Groves' testimony that other employees had concerns or complained about Ball as a General Manager;

- The Respondent's mandatory and binding arbitration agreement, which explicitly interfered with employees' Section 7 rights to file charges and obtained remedies through the Board, constituted an unfair labor practice within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

I did not, however, find sufficient evidence to support the allegation that the arbitration agreement also violated Section 8(a)(4) and, thus, that charge was dismissed.

ANALYSIS AND CONCLUSIONS

A. Eligibility under Section 102.143

The Board's Rules and Regulations at Section 102.143 provide guidance for respondents seeking an EAJA award. Section 101.143(b) requires an adversary adjudication in an unfair labor practice proceeding. Under Section 102.143(b), the Respondent must have prevailed in the adjudicative proceeding, or in a significant and discrete substantive portion of that proceeding. A corporation is eligible to receive an award under Section 102.143(c)(5) if it has a net worth of not more than $7 million and not more than 500 employees.

The Respondent meets the Section 102.143 eligibility requirements to file an EAJA application. The May 18, 2018 decision qualifies as an adversary adjudication in an unfair labor proceeding under Sections 104.133(a) and (b). The Respondent is a qualifying corporation under Section 102.143(c)(5) because it has approximately 80 employees, and a net worth of not more than $7 million.

B. Section 102.144 Substantial Justification Standard

After meeting the eligibility requirements, however, the Respondent must demonstrate that it meets the "substantial justification" standard under Section 102.144. Section 102.144(a) states:

> "An eligible applicant may receive an award for fees and expenses incurred in connection with a significant and discrete substantive portion of that proceeding,

> unless the position of the General Counsel over which the applicant has prevailed was *substantially justified*. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was *substantially justified*." [Emphasis added]

Substantial justification requires reasonableness in fact and law. The Supreme Court defines "substantially justified" as "justified to a degree that could satisfy a reasonable person," or "justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 552 fn. 2 (1988) (defining standard of review for EAJA applications). The substantial justification standard also applies if a reasonable person could draw a set of inferences which support the General Counsel's position. *In re Meaden Screw Products Co.*, 336 NLRB 298, 302–03 (reversing EAJA award determination when judge should have drawn inferences from the record that would have supported the General Counsel's position). The General Counsel has a reasonable basis in law and fact if she presents substantially credible evidence that would constitute a prima facie case. *Contemporary & Scandinavian Interiors*, 272 NLRB 527, 527–29 (1984) (finding charge substantially justified when the General Counsel's precomplaint investigation revealed employee's abrupt termination after union activities). The General Counsel does not need to show that the litigation has a high probability of success, or even persuasiveness. *See Europlast, Ltd.*, 311 NLRB 1089, 1089–90 (1983) (judge not finding the General Counsel's witnesses credible did not negate substantial justification); *Carmel Furniture Corp.*, 277 NLRB 1105, 1106 (1985) (losing the case did not negate substantial justification). In essence, the Board emphasizes that substantial justification ". . . is not intended to deter the agency from bringing forward close questions." *In re Meaden Screw Products Co.*, 336 NLRB at 300.

C. The Respondent's Arguments

The Respondent contends that the General Counsel was not substantially justified in prosecuting the unfair labor practice charge because she "ventured forward in an attempt to test a tenuous theory," and that "[t]he hearing did not reveal any new evidence or present a dispute of material fact for the ALJ to resolve." (R. Am. Appl. 9.) The amended EAJA application colorfully describes how

> ". . .the General Counsel ran [Respondent] through the gauntlet of a total of three charges soliciting multiple position statements on tangential issues. The General Counsel then issued multiple complaints and tested its theory at a hearing before an ALJ, and further before the Board—failing at both stages." (R. Am. Appl. 10.)

The Respondent first argues that the General Counsel lacked merit to pursue the unfair labor practice charges at all. The Respondent maintains that the General Counsel's case had obvious weaknesses from the start, which would defeat the notion that there was substantial justification to pursue the charges. *Hess Mech. Corp. v. NLRB*, 112 F.3d 146, 150 (4th Cir. 1997) (EAJA award granted due to "flimsiness" of the General Counsel's case, when "wall of adverse inferences" and uncorroborated testimony).

The Respondent refers to the multiple charges and complaints in this case to support its argument. (R. Am. Appl. 10.) To support its obviousness argument, the Respondent references my comment that it was "difficult to imagine" how Groves' conduct would amount to protected

concerted activity. *Bud's Woodfire Oven*, 2019 WL2298221. The Respondent also analogizes the instant case to *Hess Mechanical Corp. v. NLRB*. In *Hess*, the Fourth Circuit found the employee did not engage in concerted protected activity when he spoke to others about the union in isolated statements. The court held that the employer permissibly fired the employee for non-animus reasons. *Hess Mech. Corp*., 33 F.3d at 150–51 (finding Respondent entitled to EAJA award).

The Respondent also argues that Groves only had two witnesses' uncorroborated testimony to support the protected concerted activity claim. The Respondent maintains that " . . . [t]he General Counsel called two witnesses who did not even supply affidavits during the investigatory phase and who did not plainly support the position that Groves engaged in protected concerted activity." (R. Am. Appl. 9.) Citing to *Leeward Auto Wreckers, Inc. v. NLRB*, the Respondent argues that credibility determinations need to be material to the outcome to support substantial justification. 841 F.2d 1143, 1148–49 (reversing denial of EAJA application when the General Counsel's case lacked an actual, material conflict for the trier of fact to resolve). The General Counsel criticizes the Respondent's witness testimony argument as based on ". . . unsupported factual assertions which are demonstrably false, namely, the identities of individuals from whom the General Counsel sought and/or obtained affidavit information." (GC's Mot. Dismiss. 4.)

D. The Application Lacks Merit

The Respondent's application is premised on the fact that I dismissed the Section 8(a)(1) allegation that Groves was unlawfully discharged for exercising his Section 7 rights to engage in protected concerted activity. It also overlooks one very decisive fact – that I found that the Respondent's mandatory and binding arbitration agreement explicitly interfered with employees' Section 7 rights to engage in protected concerted activities. Accordingly, the application lacks merit since the General Counsel proceeded to hearing on the basis of a partially meritorious complaint and the Respondent fails to cite Board precedent warranting recovery in such instances.

Assuming, arguendo, that the Respondent is entitled to seek attorneys' fees based on the dismissed portion of the complaint, the application still fails. *See Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 161–62 (1990) (directing courts to assess EAJA award determinations as an inclusive whole). The General Counsel had the initial burden to establish that an employee's protected concerted activity in part motivated the employer to adversely act against him. *Wright Line*, 251 NLRB 1083, 1089 (1980) (providing causation test for when protected activity is a "motivating factor" in employer's decision). The General Counsel meets this burden when it shows the employee engaged in protected concerted activity, the employer had knowledge of that activity, and that the employer harbored animus against such activity. *See, e.g.*, *Mesker Door, Inc*., 357 NLRB 591, 592 (2011) (finding that employer violated Section 8(a)(1) by suspending employee after he discussed union issues with another employee). Once the General Counsel makes this initial showing, the Respondent has the burden to prove that it would have taken the same action even in the absence of the employee's protected concerted activity. *See Wright Line*, 251 NLRB at 1089 (expanding on protected concerted activity standard).

But for the failure to prove by a preponderance of the evidence that Groves' activity was protected and concerted in nature, the evidence would have supported a finding and conclusion that he was unlawfully discharged. Protected concerted activity often turns on close questions of law and fact. The Board does not, however, dissuade general counsels from bringing forward close questions. *In re Meaden Screw Products Co.*, 336 NLRB at 300 (reversing EAJA award

grant on substantial justification grounds from inferences). Protected concerted activity includes the terms and conditions of employment, such as working hours, the physical environment, assignments, and responsibilities. *New River Industries, Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991) (analyzing how the Act characterizes protected concerted activity). Concertedness also includes circumstances where an individual uses a conversation to bring truly group complaints to management's attention. *Alstate Maintenance., LLC*, 367 NLRB No. 68 (2019) (weighing "griping" v. group action under the *Meyers II* standard for when an individual's remark is concerted protected activity).

The General Counsel's presentation of evidence regarding Groves' activity at the October 15, 2016 staff meeting met the substantial justification standard for reasonableness. That standard requires a reasonable person to think that the justification has a reasonable basis in law and fact. *See Pierce v. Underwood*, 487 U.S. 552 fn. 2 (1988) (standard of review for substantial justification in EAJA applications). Unlike *Hess*, the General Counsel did not pursue a case with fatally apparent weaknesses. *Hess Mech. Corp.*, 112 F.3d at 150 (finding case flimsy, and facing insurmountable inferences, from the start). The credible evidence overwhelmingly established that the General Counsel did not advocate a "tenuous theory" of protected concerted activity.

The General Counsel met the burden of showing both the "knowledge" and "adverse action" elements of a *Wright Line* analysis. 251 NLRB at 1089. The employer had knowledge of the activity when it discharged Groves for criticizing Ball for not doing anything to help out the kitchen staff. Groves commented "how do you know you don't do shit around here" at the staff meeting. Groves' remark *followed* Ball starting the staff meeting with "I didn't come to work to be anybody's fucking babysitter." Groves sought to undermine Ball's general criticism of the staff performance, matching the tone set by Ball. Ball further demonstrated his animus by discharging Groves suspiciously close to the staff meeting, for admittedly shifting and unsubstantiated reasons. These insufficiencies on Ball's part precluded—had the initial element of protected concerted activity been met—the employer from meeting the burden of establishing it would have acted in the same manner absent the activity. *See Parkview Lounge, LLC*, 366 NLRB No. 71 (2018), *enforced*, *Parkland Lounge, LLC*, No. 18-1600-AG, 2019 WL 5485931, at *2 (2d Cir. Oct. 25, 2019) (employer masked unlawful discharge motive for concerted protected activity when citing inconsistent or shifting reasons).

The evidence establishes that the General Counsel reasonably believed that she was substantially justified based on the factors articulated in *Alstate Maintenance, LLC*. 367 NLRB No. 68. Reasonableness needs neither to be substantially probable nor persuasive. *See Carmel Furniture Corp.*, 277 NLRB at 1106 (not finding witnesses credible); *Europlast, Ltd.*, 311 NLRB at 1089 (government losing the case). The Board in *Alstate Maintenance, LLC* identified five factors for inferring when an individual remark in a group meeting qualifies as "group action" for protected concerted activity: (1) the statement occurred in a meeting which announced a decision on terms and conditions of employment; (2) the decision affected more than one employee at the meeting; (3) the employee who spoke up did so only to protest or complain about the decision; (4) the speaker protested or complained about how the decision would impact the workforce, not just himself; (5) the speaker did not have the opportunity to discuss the decision with employees beforehand, because the meeting presented the first opportunity for employees to address the decision. *Alstate Maint.*, 367 NLRB No. 68. Groves' comment occurred in a staff meeting in response to the manager's critical comments relating to employees terms and conditions of employment. The decision impacted more than one of the Respondent's employees. However,

there was an actual, material dispute as to whether as to whether Groves' activity met the fourth and fifth factors for "group action" under *Alstate Maintenance, LLC. Id.*

The Respondent's reliance on the insufficient corroboration of the witness testimony presented does not undermine substantial justification. The close question of law and fact is whether Groves engaged in protected concerted activity. I found that Ball and Groves provided generally consistent accounts of the October 15, 2016 staff meeting. I also credited Groves' testimony that he talked to coworkers about Ball's inadequacies as a manager. I interpreted Groves' criticism as challenging Ball's managerial duties and responsibilities which are obviously entwined with the working conditions of the kitchen staff. *Bud's Woodfire Oven, LLC d/b/a Ava's Pizzeria*, 2018 WL2298221. I also found, however, that neither Butler nor Harris sufficiently corroborated Groves's testimony that they shared his concerns or complained about Ball. *Bud's Woodfire Oven, LLC d/b/a Ava's Pizzeria*, 2018 WL2298221.

Accordingly, the sustained complaint allegations based on the unlawfulness of the Respondent's arbitration agreement require denial of the application. Moreover, even though the allegations relating to Groves' discharge due to protected concerted activity were not sustained, I find that the General Counsel was "substantially justified" in prosecuting those allegations as well within the meaning of EAJA. See *In re Meaden Screw Products Co.*, 336 NLRB at 300 (it was possible to draw a different set of inferences from the evidence presented at the hearing that would support, and substantially justify, the General Counsel's position).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The application of Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria, for attorneys' fees and other expenses under the Equal Access to Justice Act is denied.[6]

Dated, Washington, D.C. November 6, 2019

Michael A. Rosas
Administrative Law Judge

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] Since the EAJA application is denied on the grounds that the General Counsel was substantially justified in prosecuting Groves' charges, I make no findings regarding the sufficiency of its proffered net worth, fees and expenses.